No. 93-1543

In The
Supreme Court of the United States
October Term, 1994

CHRISTIE McKENNON,
Petitioner,
v.
NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rules 37.1 and 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of Respondent in this case, the Nashville Banner Publishing Co. The written consent of Respondent for the submission of this brief has been filed with the Clerk of Court. Because counsel for Petitioner has not responded to correspondence and telephone calls seeking Petitioner's consent, the Chamber assumes that such consent is refused.

In support of this motion, the Chamber shows the following:

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents approximately 220,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 300 cases of importance to the business community. Those cases include *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), *ABF Freight Systems, Inc. v. NLRB*, 114 S. Ct. 835 (1994), *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989),. and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

2. Substantially all Chamber members, or their constituents, are employers subject to various equal employment opportunity laws, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (Supp. IV 1992) ("ADEA"), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992) ("Title VII"), and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (the "1991 Civil Rights Act"). The Chamber has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this appeal, which transcend the interests of the parties to this case.

3. The issue before the Court—whether concealed employee misconduct which would have resulted in discharge bars an employment discrimination claim—is of direct and immediate interest to the Chamber and its members, who wish to maintain important workplace standards of conduct. Allowing plaintiffs to recover notwithstanding employer proof of a prior dischargeable offense insulates employees who file suit from the normal consequences of their acts, and effectively sets aside normal workplace rules of conduct. Employees clever enough to conceal their wrongdoing reap a substantial and unjustified benefit when a court posits a continuing legal duty between them and an employer who could and would lawfully have ended the relationship.

4. These concerns are particularly acute when the entire employment relationship is founded on employee fraud. Recent studies conservatively estimate that 30% of job applicants materially misrepresent their credentials and qualifications for employment.* The rise in negligent hiring and retention claims, and, in many industries, a web of government regulations, require employers carefully to select qualified employees. Where an employer can prove that it would not have hired an employee based on either the substance of the misrepresentation or the misrepresentation itself, or that it would have fired the employee once the misrepresentation is discovered, the employee should not further benefit from the employment relationship by receiving damages for successfully concealing the fraud.**

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* *See generally* Arthur A. Sloan, *Countering Resume Fraud Within and Beyond Banking: No Excuse for Not Doing More*, Lab. L.J., May 1993, 303, 303 (citing studies); Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 Stan. L. Rev. 175, 176 n.5 (1993) (citing studies); *see also Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1186 (11th Cir. 1992) (Godbold, J., dissenting) ("[t]he problem of false applications for employment is major in scope") (citing authorities).

** *See, e.g., Jordan v. Johnson Controls, Inc.*, No. 05-93-00132-CV, 1994 WL 65650 at *4 (Tex. Ct. App. 1994) (ignoring after-acquired evidence would serve as an incentive "to deceive and mislead the prospective employer in every possible way" in order to gain employment).

5. The so-called "after-acquired evidence doctrine" seeks to harmonize these concerns with the central goal of federal laws prohibiting employment discrimination: establishing objective employment policies which are uniformly administered, thus ensuring equal treatment for all. Denying recovery to employees who have engaged in serious misconduct will provide a powerful incentive for employers to establish objective rules and to ensure their uniform administration, for without such actions an employer will be unable to prove the basic elements of such a defense. Recognizing this defense also will provide a powerful incentive to combat employee fraud and misconduct. The result will be more objective workplaces, less employee fraud, and less expenditure of scarce judicial resources on lawsuits that are unlikely to alter the ultimate legal relationship between the parties.

WHEREFORE, for the reasons stated, the Chamber respectfully requests that the Court grant it leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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September 8, 1994

QUESTION PRESENTED

May an employee who has committed but concealed serious misconduct sue an employer for age discrimination, despite employer proof that it would have discharged the employee had it known of the misconduct?

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INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion for leave to file this brief.

STATEMENT OF FACTS

Petitioner Christine McKennon, formerly a confidential secretary to the Comptroller of Respondent Nashville Banner Publishing Co. (the "Banner"), was one of nine employees laid off during a reduction in force in October 1990. She filed suit claiming that her layoff violated the Age Discrimination in Employment Act ("ADEA") and Tennessee state law. During her deposition, held on December 18, 1991, Petitioner admitted that she knew that she was forbidden to copy or disclose confidential and proprietary business information to which she had access in the course of her work, and that "if [she] showed these documents to anybody, [she] would have been terminated." (J.A.[1] at 154a; *see also* J.A. at 117a-118a, 132a-133a, 150a.) Nonetheless, Petitioner copied and removed from Respondent's premises the Fiscal Period Payroll Ledger (containing salaries and related financial information), the Banner's profit and loss statement, and several confidential documents from a manager's personnel file. J.A. 141a-154a.)

Based upon these admissions, Respondent filed a motion for summary judgment, supported by several uncontradicted affidavits as well as sworn deposition testimony, establishing that had Respondent been aware of Petitioner's actions, she would have been immediately terminated. The District Court granted the motion, finding that Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." (*See* Appendix to the Petition for a Writ of Certiorari at 17a.) The Sixth Circuit affirmed. (*See id.* at 1a-9a.)

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[1] References to the Joint Appendix are abbreviated in this brief as "J.A."

SUMMARY OF ARGUMENT

After-acquired evidence of serious employee misconduct may take many forms. Such evidence may directly reinforce an employer's stated reason for termination or prevent a plaintiff from establishing a central element of her claim; it also may concern issues that otherwise would not be relevant to the case, such as proof that the entire employment relationship was founded on fraud. For this reason, the sweeping claims of Petitioner and her amici—that after-acquired evidence *never* can play a role at the liability stage, and that such evidence *always* must play a certain specified role at the remedial phase—are not useful in addressing the questions posed by after-acquired evidence of serious employee misconduct in employment litigation.

Rather than recognizing the variety of issues that can be raised by after-acquired evidence of employee misconduct, Petitioner and her amici inveigh against a so-called *per se* rule allegedly adopted by the Sixth and Tenth Circuits. It is a far cry, however, from arguing that after-acquired evidence should not *always* bar relief to claiming that such evidence *never* can affect liability. Petitioner and her amici (save the United States, *see* Brief for the United States at 20 n.12) make precisely such an illogical and unwarranted leap, defending this result on policy grounds. Yet, virtually all of the policy concerns that supposedly justify their proposal—for example, that allowing after-acquired evidence to affect liability will dissuade potential plaintiffs from suit, or will inveigle the courts in collateral disputes—are completely undercut by their admission that after-acquired evidence should have a substantial role in employment discrimination litigation, albeit at the remedial phase.

This case, therefore, does not concern the viability *vel non* of after-acquired evidence in employment discrimination litigation; it concerns the use to which such evidence may be put. At the risk of oversimplification, we suggest that three important questions should be addressed by the Court, and answered in the following fashion.

- *Under what circumstances should after-acquired evidence of serious misconduct bar an employment discrimination claim?*

After-acquired evidence of serious employee misconduct relating to an issue otherwise relevant to the case—for example, evidence first discovered at deposition that precludes a plaintiff's showing of pretext, or establishes that the plaintiff was not qualified for the position in question—is competent to negate liability under standard summary judgment principles. After-acquired evidence of serious employee misconduct not otherwise relevant to the case should bar a claim where it deprives the plaintiff of the clean hands necessary to pursue equitable relief, indicates that the employment relationship was based upon fraud, or otherwise falls within a legal or equitable defense available in the federal courts. Nothing in the language or legislative history of the ADEA or Title VII indicates that Congress intended to restrict the range of otherwise available defenses in employment discrimination litigation. The availability of normal legal and equitable defenses generally will result in a barrier to liability where an employer can prove that the plaintiff engaged in serious misconduct or fraud which, absent concealment, would have precluded initial hire or would have resulted in termination.

- *What effect should after-acquired evidence have on remedies in employment discrimination litigation?*

Assuming that after-acquired evidence does not totally bar liability in a given case, it necessarily must bar any substantive relief to a plaintiff who has committed but concealed serious misconduct. Awarding reinstatement, back pay, or damages to a person shown to have obtained or retained her job through fraud provides an unwarranted judicial windfall to a plaintiff who either never should have been hired or should have been discharged. Moreover, awarding any relief beyond a declaratory judgment and attorneys' fees would treat such an employee more favorably than an employee who has engaged in no deception or concealment, an anomalous result at odds

with the intent of Congress as enunciated in the 1991 Civil Rights Act.

- *What predicate must an employer establish to rely upon after-acquired evidence as a defense to liability or imposition of a substantive remedy?*

After-acquired evidence sufficient to bar liability or limit relief (depending upon its character in any given case) must be material and, significantly, of the sort that would have resulted in a refusal to hire, or a decision to discharge, the plaintiff. Such proof may rest upon written employer rules, employer testimony, or affidavit evidence regarding workplace policies or the past treatment of the same or similar offenses.

ARGUMENT

I. AFTER-ACQUIRED EVIDENCE MAY BAR LIABILITY IN APPROPRIATE CASES.

The proposition that after-acquired evidence of serious employee misconduct *never* can affect liability in an employment discrimination case is demonstrably untrue. Indeed, the United States itself identifies two circumstances in which liability should be affected by after-acquired evidence:

- Where a plaintiff's hiring claim is undercut by post-refusal evidence that the plaintiff is not qualified for the job (*see Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1178 n.8 (11th Cir. 1992); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984); *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 102 (D.C. Cir. 1981), *cert denied*, 456 U.S. 915 (1982)); and
- Where a plaintiff obtains a job by misrepresenting an essential job qualification such as a medical degree (*see Summers v. State Farm Mut. Automobile Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988)).

See Brief of United States at 20 n.12.

These examples merely confirm a commonplace—that some concealed employee offenses must bar an employment discrimination claim. An applicant dishonestly claiming to be a physician has no legal claim against an employer who refuses to hire him as a doctor or terminates him because he lacks the medical knowledge necessary to treat patients. This is not the "innocent victim" of a "lawless employer," as Petitioner and her amici repeatedly state; this is an individual engaged in serious and unjustifiable fraud who has no legal claim for mistreatment.[2]

The split in the circuits between the courts that consider after-acquired evidence a bar to liability[3] and those

[2] Petitioner and her amici consistently refer to plaintiffs as "innocent victims" of "lawless employers," based upon the proposition that, for purposes of a summary judgment motion, the claims of the party opposing the motion must be taken as true. Neither this procedural doctrine nor Petitioner's loaded language should preclude the Court from clearly assessing the contending parties in a normal after-acquired evidence dispute: an employer which is *alleged* to have discriminated against the plaintiff, and an employee who *indisputably* has committed serious misconduct or fraud.

[3] The Sixth, Eighth, and Tenth Circuits have held that after-acquired evidence can preclude all recovery and bar employment discrimination claims in their entirety. *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993); *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F 2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Dotson v. United States Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992); *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994); *Summers*, 864 F.2d at 700 (10th Cir. 1988).

The Fourth Circuit also has held that when an employer discovers information on the grounds on which it would have refused to hire an applicant, and can show that the information would have been revealed in the normal course of the application process, the plaintiff is entitled to no relief on a failure to hire claim. *Smallwood*, 728 F.2d at 623-24; *see also Murnane*, 667 F.2d at 102 (D.C. Cir. 1981) (regardless of whether the employer discriminatorily failed to consider applicants, it can prove at trial that plaintiffs were not injured because they were not qualified and would

that view such evidence as a limitation on relief [4] is based, in our view, upon inadequate analysis of the underlying doctrine itself. We suggest that the common-sense results discussed above can be justified on several separate and independent legal bases, any of which is sufficient in and of itself to bar liability in appropriate cases.

A. After-Acquired Evidence May Render It Impossible for Plaintiff to Prove A Claim.

Summary judgment is appropriate in employment discrimination cases, as in all other cases, when there are

not have been hired). In *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379, 383 (D. Md. 1993), the court concluded that the Fourth Circuit would hold that summary judgment should be granted "when after-acquired evidence of fraud nullifies any remedies, thereby rendering any determination of liability moot") (citing cases).

[4] The Seventh Circuit has recently recognized the after-acquired evidence defense as barring relief after the point at which the information is discovered. *Kristufek v. Hussman Foodservice Co., Toastmaster Div.*, 985 F.2d 364 (7th Cir. 1993); *cf. Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (noting in dictum that after-acquired evidence of employee fraud could cut off back pay and reinstatement). In an earlier decision, however, the Seventh Circuit had indicated that after-acquired evidence of a dischargeable offense bars statutory discrimination claims. *Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); *cf. Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992) (noting that proof that the employer would have fired the employee is the appropriate inquiry to determine whether relief should be barred).

The Third and Eleventh Circuits have held that the after-acquired evidence defense is relevant only to damages, barring prospective relief but allowing back pay until the date of judgment unless the employer can prove that it would have discovered the evidence earlier in the absence of litigation. *Mardell v. Harleysville Life Ins. Co.*, No. 93-3258, 1994 WL 396512 (3d Cir. 1994); *Wallace*, 968 F.2d at 1174 (11th Cir. 1992).

See also EEOC v. Farmer Bros., 65 Fair Empl. Prac. Cas. (BNA) 857, 864-65 (9th Cir. 1994) (discussing the after-acquired evidence doctrine in dictum; observing that the doctrine should not operate as an "absolute rule" regarding appropriate relief in resume fraud cases and that "common sense and a reasonably developed sense of equity" should guide the inquiry).

no genuine issues of material fact.[5] When all of the evidence (including after-acquired evidence) indicates that a plaintiff cannot prove essential elements of her claim, there is no reason to continue the litigation. The clearest case for this result is that posited in *Wallace*, 968 F.2d at 1178 n.8, and applied in *Smallwood* and *Murnane*, *see supra*, note 3, where the plaintiff's hiring claim is undercut by after-acquired proof that she lacked a required college degree or otherwise was not qualified for the position in question. In such circumstances, the plaintiff would be unable to establish the essential requirement that she was qualified, *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981), and no point would be served by further litigation.[6] Likewise in discharge cases, a plaintiff's lack of qualifications may defeat a prima facie case and bar the claim if the employer proves that it would not have hired the plaintiff in the first place. *E.g., Johnson*, 955 F.2d at 414 (misrepresentations regarding college degrees on which employer relied at hiring barred state wrongful discharge claim); *Dotson*, 977 F.2d at 978 (granting summary judgment on discriminatory discharge claims where plaintiff concealed misconduct on basis of which he was not qualified for job and would not have been hired).

Similarly, under *Burdine*, the plaintiff bears the burden of proving that the nondiscriminatory reason articulated by the employer was a pretext for intentional discrimi-

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

[6] Under existing law, summary judgment is appropriate in cases in which the plaintiff cannot establish qualification or another essential element of her claim. *See generally* Douglas L. Williams & Julia A. Davis, *Skeletons in the Closet: "After Acquired Evidence" As a Defense to Discrimination Claims*, C874 ALI-ABA 369, 375 (1993) [hereinafter "Williams & Davis"]. "The Supreme Court [has] recognized that a plaintiff with a negligible likelihood of personal recovery should not consume federal judicial resources, even if 'true' discrimination occurred." *Id.* at 377-78 (citing *East Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977)).

nation. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2746-47, 2749 (1993). After-acquired evidence may reinforce the employer's articulated reason so substantially that no judge or jury could find for the plaintiff, thus justifying summary judgment for the employer. For example, in *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir. 1988), the plaintiff was terminated after serving a disciplinary probation for falsifying insurance claim forms. Following his termination, State Farm discovered more than 150 additional instances of falsification unknown at the time of his discharge, many of which occurred following Summers's probationary period. Nothing in law or in logic required continuation of this litigation where the evidence (some after-acquired) plainly established that the employee could not prove pretext.[7]

These cases are merely illustrative of situations that may arise again and again. In each situation (and numerous others that can be imagined), evidence of employee misconduct discovered after the fact is directly relevant to an issue otherwise in the litigation. Where this is so, normal summary judgment principles may warrant judgment for the employer.

Petitioner and several of her amici, however, apparently would conclude that this case and like cases must be tried to their full conclusion because after-acquired evidence is relevant *only* to remedy, and *never* can affect liability. This conclusion makes no sense unless this Court is prepared to hold that after-acquired evidence is inadmissible at the liability phase of a case, a result that even Petitioner does not suggest. Assuming that evidence of concealed employee misconduct may be admitted if relevant, after-acquired evidence plainly can affect liability and, in

[7] *Cf. Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224-25 (11th Cir. 1982) (no proof that plaintiff's falsification of work records was a pretext for age discrimination where plaintiff conceded his misconduct and admitted that the employer uniformly discharged employees guilty of similar falsifications regardless of age).

appropriate cases, can warrant summary judgment for an employer.[8]

B. After-Acquired Evidence May Preclude Liability In Appropriate Cases Under Normally Applicable Legal and Equitable Defenses.

The more significant and interesting question in this case is whether after-acquired evidence of employee misconduct not otherwise relevant to issues pending in the case may bar liability. Recognizing a so-called "after-acquired evidence defense" in such circumstances is appropriate but, in most cases, facts establishing such a defense based on serious employee misconduct or fraud will bar liability under one of several traditional legal or equitable defenses.[9]

As this Court has long recognized, Title VII and the ADEA essentially provide for equitable rather than legal relief for successful litigants. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1490 (1994) (back pay under

[8] Petitioner's argument runs directly contrary to this Court's approval of summary judgment, *see supra*, note 5, and to effective workload management by the federal courts. In 1970, 336 federal employment civil rights cases were filed in the federal courts. This number had risen to 7,613 by 1989, almost all of which were individual complaints. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 989 (1991) [hereinafter "Donohue & Siegelman"]. *See also id.* at 984 (discussing the concomitant shift from hiring to firing claims and the decline in the number of class actions filed). Meanwhile, the number of employment discrimination charges filed with the EEOC rose to a record high of nearly 88,000 in fiscal year 1993, about half of which alleged discriminatory discharge. *Daily Lab. Rep.* (BNA), No. 9, at AA-1 (Jan. 1, 1994).

[9] *See generally* Jennifer Miyoko Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 Wash. L. Rev. 651, 660-62 (1993) [hereinafter "Follette"] (noting that "the majority approach implicitly applies the unclean hands doctrine . . . to balance the equities and consider whether plaintiff's own conduct should bar or reduce an award.").

Title VII is an equitable remedy); *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) ("[T]his Court has labeled back pay awarded under Title VII . . . as equitable."); *see also Lorillard v. Pons*, 434 U.S. 575, 583 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII") (footnote omitted); 42 U.S.C. § 2000e-5(g)(1) (Supp. IV 1992) (courts in Title VII cases may order such "equitable relief as the court deems appropriate"); *cf.* 29 U.S.C. § 626(b) (1988) (in ADEA cases, courts can grant "such legal or equitable relief as may be appropriate").

The three principle components of relief under Title VII are injunctive, declaratory, and restitutionary, each of which has its roots in courts of equity and is decided by a judge rather than a jury.[10] Dan B. Dobbs, *Handbook on the Law of Remedies* § 2.1 at 25-26, 28 (1973) [hereinafter "Dobbs"]. Under the ADEA, similarly, the preferred remedies are reinstatement and back pay. *E.g., Maxfield v. Sinclair, Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1171-72 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); *see also* Brief of the United States at 11-12. Liquidated damages under the ADEA are a form of compensatory, rather than punitive, relief. *E.g., Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985) (citing H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S.C.C.A.N. 528, 535).

In light of the equitable nature of an action to remedy allegedly discriminatory employment practices, this Court and lower courts have recognized that equitable principles may be asserted in employment discrimination litigation.

[10] This discussion is based on the law in effect at the time this case was decided. As set forth *infra*, Part II, the analysis is unchanged by the 1991 Civil Rights Act, which allows capped compensatory and punitive damages under Title VII, but not the ADEA. The 1991 Civil Rights Act is not retroactively applicable to this case. *Landgraf*, 114 S. Ct. at 1508.

E.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (the statutory charge-filing requirement is not jurisdictional in nature, but a requirement that "is subject to waiver, estoppel, and equitable tolling").[11] Lower courts routinely consider defendants' claims that the equitable doctrine of laches bars otherwise sustainable and meritorious employment discrimination claims. *E.g., Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co.*, 839 F.2d 1147, 1153 (6th Cir.) ("[T]he doctrine of laches, like other equitable considerations, should be applicable to a Title VII proceeding in practice as well as theory."), *cert. denied*, 488 U.S. 899 (1988).

Nothing in the text or legislative history of the ADEA or Title VII suggests that Congress intended to bar litigants from asserting affirmative equitable defenses based on after-acquired evidence.[12] For example, nothing in

[11] While *Zipes* involved equitable doctrines being used to assist plaintiffs, there is absolutely no justification why equitable doctrines may not also assist defendants. As the old adage goes: "What's sauce for the goose is sauce for the gander." *See Fogarty v. Fantasy*, 114 S. Ct. 1023, 1033-35 (1994) (Thomas, J., concurring) (in deciding appropirate standard for award of attorneys' fees to prevailing parties in copyright infringement actions, Court properly interpreted statutory language as making fees award for either party a matter within the trial court's discretion, and should have taken the same "even-handed" approach in establishing the standard for award of attorneys' fees under similar fees provision in Title VII); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States").

[12] *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-70 (1991) ("[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'") (citations omitted); *cf. Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992) ("the language and policy of Title VII do not undercut the applicability of res judicata, and we see no reason militating against application of well-settled claim preclusion principles"), *cert. denied*, 113 S. Ct. 977 (1993). The same equitable defenses are available under the 1991 Civil Rights Act. *See infra*, Part II; Williams

either statute states or even implies that the equitable defense of unclean hands is inapplicable in an employment discrimination case. Under the unclean hands doctrine, a plaintiff is barred from receiving any form of equitable relief to which he or she otherwise would be entitled, if the plaintiff comes before the court having committed "any sort of conduct that equity considers unethical, even if that conduct is perfectly legal." Dobbs § 2.4 at 46. *See also ABF Freight Sys., Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia and O'Connor, JJ., concurring) ("[t]he 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, no matter how improper may have been the behavior of the defendant") (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 342 U.S. 806, 816 (1945)).[13]

& Davis, *supra*, note 6, at 375-77 (explaining that the 1991 Civil Rights Act "does not exclude [a] standing argument").

[13] In *ABF Freight Systems*, this Court reviewed only the very narrow question of whether to sustain the NLRB's determination that a union employee's post-firing lie under oath to an administrative law judge (during unfair labor practice proceedings stemming from his discharge) did not cause him to forfeit the remedies of reinstatement and back pay. 114 S. Ct. at 839 & n.8. Although both the majority and concurring opinions expressed concern regarding the employee's perjury and the Board's treatment of it, *id.* at 839-41, the Court upheld the Board's ruling based on "Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the [National Labor Relations] Act." *Id.* at 839. Thus, for a number of reasons, *ABF Freight Systems* does not resolve the instant dispute. First and foremost, no congressional delegation of policy-making and quasi-judicial decisionmaking authority is at issue here, and the judicial deference accorded to the NLRB in *ABF Freight Systems* has no applicability. Second, as this Court tacitly explained by avoiding discussion in *ABF* of the after-acquired evidence cases, the after-acquired evidence doctrine simply does not square with the facts in *ABF*. Unlike Petitioner and the other plaintiffs in the after-acquired evidence cases, the union employee committed his damning misconduct—lying under oath—*after* rather than during or before his employment. *See id.* at 837. Moreover, ABF did not assertedly base its discharge decision on the apparent

Accordingly, an unclean hands defense has been accepted as a bar to liability in a variety of employment discrimination cases. For example, in *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123 (N.D. Ill. 1979), the court denied equitable relief to a female secretary bringing claims of sexual harassment because the plaintiff had harassed her employer following her discharge. Similarly, when a plaintiff asserts in Title VII litigation a position that is plainly at odds with his earlier conduct, his unclean hands will bar the claim. *Woods v. Ficker*, 768 F. Supp. 793, 802 (N.D. Ala. 1991) (describing a "bad case" of unclean hands which, if not fatal, "operates as an estoppel"), *aff'd without opinion*, 972 F.2d 1350 (11th Cir. 1992).[14]

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falsehood, but on the pretextual grounds that the employee had violated a new tardiness rule. *Id.* at 838 & n.5. Thus, the Court was not presented with the issue confronting it today.

[14] *See also Holt v. Winpisinger*, 811 F.2d 1532, 1542 (D.C. Cir. 1987) (considering but rejecting defendant's unclean hands defense to an employee's claim for pension benefits brought under ERISA where the employee had obtained employment in violation of "loosely observed" policies and where such violation was "easily discoverable" and resulted in no unfairness to the employer); *Carpenter v. Ford Motor Co.*, 761 F. Supp. 62, 66 (N.D. Ill. 1991) (unclean hands defense may be asserted to Title VII claim, but defendant failed to plead with particularity the circumstances of the plaintiff's allegedly defrauding the employer regarding the reason for taking a medical leave of absence); *Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1489, 1492-93 (N.D. Ala. 1991) (equitable defenses are available to employers in Title VII actions, but the plaintiff's hands were only "smudged," and not unclean, where she had become pregnant by a customer, shared that information with her employer, and thereby caused the loss of the customer). *Cf. Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 451 (11th Cir. 1993) (where employer defended plaintiff's claims that she was paid less because of her race on after-acquired evidence that the plaintiff had lied about having a college degree when she was hired, an unclean hands defense would fail because neither the plaintiff's predecessor nor successor was required to have a college degree and the employer did not prove it was injured by hiring the plaintiff).

Petitioner and her amici argue that an "after-acquired evidence defense" cannot be justified on unclean hands principles. We disagree. In many situations, after-acquired evidence reveals such profound employee misconduct as to give rise to an unclean hands defense that should bar liability under traditional equitable principles. For example, consider an employee working for a drug company which manufactures narcotics who is fired for poor performance. After the employee files a Title VII suit challenging his discharge, a police investigation reveals that the employee was stealing large quantities of drugs and selling them while at work. By violating strict workplace policies on theft and drug abuse (to say nothing of a wide variety of federal and state laws), the employee's offense should be considered so substantial as to preclude relief under standard equitable principles. Nothing in the ADEA or Title VII establishes that this individual, who would have no other claims against the employer under the unclean hands doctrine, should be entitled to pursue a claim for back pay, reinstatement, or mental anguish under the civil rights laws.

Petitioner and her amici argue to the contrary, on grounds that equitable doctrines should not be allowed to defeat the "purposes" of a civil rights statute. We strongly disagree that recognition of a standard equitable doctrine such as unclean hands would defeat the purposes of the ADEA or Title VII. Even more important, we believe that this formulation obscures the question, because it assumes that strong policy considerations are in direct conflict with application of normal equitable defenses; only then would it be appropriate to conclude that Congress intended to suspend principles otherwise applicable to federal and state court litigation.

Petitioner and her amici cannot demonstrate any such conflict. Indeed, many of the allegedly inappropriate results claimed by Petitioner and her amici will occur under their proposed wooden reading of the ADEA and Title VII. If after-acquired evidence of serious employee misconduct is recognized in the remedial phase of an employ-

ment discrimination case, as Petitioner proposes, prospective plaintiffs presumably will be inhibited by analysis of their past histories and litigation over "collateral disputes" will proliferate.

Neither will the twin goals of making plaintiffs whole or providing an incentive for employer compliance be frustrated by recognizing such a standard equitable defense. This Court previously acknowledged that denial of back pay on equitable grounds in a particular dispute does not frustrate the broader goals of eradicating discrimination and making persons whole for injuries caused by discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). As this Court cautioned, appellate courts should bear in mind "that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Id.* at 421-22. In *Albemarle*, the court indicated that the equitable defense of laches may bar part or all of a back pay claim, nothing that "[t]o deny back pay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII." *Id.* at 424.[15]

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[15] *See also City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (approving denial of back pay remedy where plaintiffs had proved sex-based actuarial practices but where an award of back pay would have had drastic effects on pension funds); *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) (an employer may prove that an employee who lacked essential qualifications would not have been hired, and therefore did not suffer any injury under Title VII); *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 406 (5th Cir. 1974) ("In the proper case, laches might be applied to bar a claim entirely, or it might bar only part of the remedy sought, such as the back pay award or a portion of it."); *reversed on other grounds*, 424 U.S. 747, 764 (1976) (federal courts have power under Title VII "to fashion such relief as the particular circumstances of a case may require to effect restitution"); *Langnes v. Green*, 282 U.S. 531, 541 (1931) (trial courts have discretion to identify a "just result" under the particular facts of each case) (cited in *Albemarle*, 422 U.S. at 424); *cf. Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1653 (1991) (no inconsistency between social goal of eradicat-

Moreover, it is absolutely fanciful to believe that recognition of a standard equitable defense will materially inhibit employer efforts to comply with the civil rights laws. Petitioner's apparent contention is that the very possibility of discovering some wrongful act in a particular plaintiff's background will convince employers to abandon all efforts at compliance. Depending upon the chance of occasionally discovering a deceitful plaintiff is hardly an alternative to full-fledged compliance with the laws, especially in light of the significantly enhanced damage remedies provided under the 1991 Civil Rights Act. Denying relief to a particular plaintiff in highly individualized circumstances does not conflict with the congressional goal of fostering equal opportunity for all.

Indeed, recognition that after-acquired evidence of serious employee misconduct can have a significant impact in employment litigation should foster the goals of the law. As we suggest *infra*, in Part III, employers seeking to depend upon after-acquired evidence of serious employee misconduct must be prepared to prove that the conduct would have resulted in termination had it been discovered. In order to do so, evidence of uniform rules applied in an even-handed manner will be critical. This very fact will impel employers to develop and maintain objective policies and to ensure their uniform administration.[16]

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ing age discrimination and enforcement of individual agreements to arbitrate age claims); *John Cuneo, Inc.*, 298 NLRB 856 (1990) (unclean hands may preclude usual remedy of reinstatement).

[16] The proposition that employers will establish discharge standards in order to trap unwary employees could only be posited by individuals who have never been employers. Employers invest huge sums in hiring and training a qualified workforce: in companies with substantial labor costs, employee productivity may be the single most significant factor in a company's success. Companies desirous of maintaining a highly qualified workforce are hardly likely to manipulate employment standards so as to trap unwary employees in "innocuous misconduct," as opposed to establishing legitimate standards based upon the needs of the business. *See generally* William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992)*, 72

Unclean hands is only one of many possible equitable and legal defenses in which after-acquired evidence of unrelated employee misconduct may be determinative. For example, it is hornbook law that in order to form a valid contract, there must be a "meeting of the minds." 6 Arthur Linton Corbin, *Corbin on Contracts* § 536 at 33-34 (1960) [hereinafter "Corbin"]. When a contractual relationship is induced by fraud, there is no such meeting of the minds and the employment contract is voidable. *See generally Restatement (Second) of Contracts* § 164(1) (1981); 1 Corbin § 6 (1963); Dobbs § 9.1 at 593-94. Likewise, conduct during contract performance which would have justified terminating the contract constitutes a defense to a breach of contract claim, whether or not the conduct was known when the alleged breach occurred. *College Point Boat Corp. v. United States*, 267 U.S. 12, 15 (1925) ("A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact.") (footnote omitted).[17] Agency principles reinforce this contract law maxim. "If a principal has cause for the

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Neb. L. Rev. 330, 347 (1993) [hereinafter "Muth"] ("The *Wallace* court's concerns over the employer setting an abnormally low standard for termination is [sic] not justified. . . . [A]n employer would have to systematically hire and fire several employees for very minor infractions in order to establish the low standard. It seems highly illogical that an employer would engage in such a practice in hopes of getting away with discrimination in the future."); *see also id.* at 346-47 (criticizing *Wallace*'s reasoning that the after-acquired evidence doctrine encourages employers to "rummage" through personnel files to discover a reason for termination and to "sandbag" employees at termination with knowledge of dischargeable conduct).

[17] *See also* 6 Samuel Williston, *A Treatise on the Law of Contracts* § 839 at 141 (3d ed. 1962) [hereinafter "Williston"] (a defendant "should be excused from liability if the plaintiff has failed in a material particular to perform his contract although the defendant at the time when he refused to perform or to continue performance was ignorant of the plaintiff's prior breach of obligation").

discharge of an agent and discharges him, the fact that the principal is not at the time aware that he has cause for discharge is immaterial." *Restatement (Second) of Agency* § 409(1) cmt. e (1958).[18]

Under this contractual rule, therefore, it makes no difference whether the independent grounds for terminating an at-will employee's contract—the employee's fraud or misconduct—is discovered before or after the employment contract is terminated. "[A]n employee cannot prevail in an action for wrongful discharge where the employee committed acts which were cause for termination, whether or not the employer knew of those acts at the time of discharge . . . ." *Benson v. Quanex Corp.*, 58 Fair Empl. Prac. Cas. (BNA) 743, 746 (E.D. Mich 1992) (noting that federal and state courts have recognized this principle in beach of contract cases for "more than 100 years"). Accordingly, state and federal courts have repeatedly ruled that state law breach of contract or tort claims arising out of termination of employment are barred by after-acquired evidence of employee fraud or misconduct.[19]

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[18] *See also* 5 Williston § 744 at 531 (3d ed. 1961) ("[i]f when [a servant] was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to [the master] or whether the reason assigned for such discharge was sufficient, [the master is not] precluded by the first or any notice of discharge from proving an existing ground not therein referred to" (citation omitted)); 3A Corbin § 762 at 526 (1960) ("[I]n the relation of master and servant, if the servant has given sufficient cause for discharge the master is privileged to discharge him. The fact that the master omits to mention this cause, either because he does not know it or because he prefers to state some other reason, does not deprive him of his privilege.").

[19] *E.g., Bazzi v. Western & S. Life Ins. Co.*, 808 F. Supp. 1306 (E.D. Mich. 1992) (breach of contract claim barred due to fraud in the inducement), *reversed on other grounds*, 25 F.3d 1047 (table), 1994 U.S. App. LEXIS 14,410 (full text) (6th Cir. 1994); *Leahey v. Federal Express Corp.*, 685 F. Supp. 127 (E.D. Va. 1988) (after-acquired evidence of employee's sexual and racial slurs can bar at-will employee's wrongful discharge claim); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 591 F. Supp. 812, 820 (N.D. Ill. 1984) (under Illinois law, "the party terminating a contract may assert any grounds justifying termination, whether or not it announced those grounds at the time of termination"), *aff'd*, 766 F.2d 1007 (7th Cir. 1985); *Schuessler v. Benchmark Mktg. & Consulting*, 500 N.W.2d 529 (Neb. 1993) (barring breach of contract claims where evidence of misconduct warranting termination was discovered after the employee's discharge); *Flesner v. Technical Communications Corp.*, 575 N.E.2d 1107 (Mass. 1991) (accepting after-acquired evidence of resume fraud as a complete defense to wrongful discharge, misrepresentation, breach of privacy, and state civil rights act claims, but remanding for determination whether plaintiff made material misrepresentations); *Robitzek v. Reliance Intercontinental Corp.*, 167 N.E.2d 74 (N.Y. 1960) (affirming summary judgment for employer on breach of contract claims where employer presented after-acquired evidence that employee falsely claimed to have bachelor's and master's degrees and employer relied on these misrepresentations in entering into employment contract).

The fundamentally contractual employer-employee relationship undergirds the ADEA and Title VII.[20] These statutes implicitly assume that the employment relationship was legitimately obtained and continued in order for plaintiffs to benefit from their protection. Where this is not the case—for example, where the plaintiff has misrepresented an essential qualification, *see supra*, Part I.A., and Brief of the United States at 20 n.12—no valid employment relationship ever was established. This is true even where the employee's fraud was not discovered until litigation began.

A similar analysis would allow after-acquired evidence of employee misconduct not otherwise relevant to the litigation to form the basis for a claim of fraud, misrepresentation, or equitable estoppel as well. Indeed,

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[20] *See Burke v. United States*, 112 S. Ct. 1867, 1878 (1992) (" 'the rights guaranteed by Title VII *are* implied terms of every employment contract' ") (Souter, J., concurring) (quoting Charles A. Shanor and Samuel A. Marcossan, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 Lab. Law. 145, 174 n.118 (1990)). A closely related civil rights statute, 42 U.S.C. § 1981 (Supp. IV 1992), explicitly premises employment discrimination claims on contract law principles by ensuring that the right to "make and enforce contracts" is not abridged due to race.

in some situations such evidence will deprive a plaintiff of standing to sue. *See Wallace*, 968 F.2d at 1185 (Godbold, J., dissenting); *cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 913 (1984) (Powell and Rehnquist, JJ., dissenting) (disagreeing with majority's view that it was within the discretion of the NLRB to define "employee" under the NLRA to include undocumented aliens and to extend remedies to such persons; "It is unlikely that Congress intended the term "employee" to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws."); *Fair Employment Council v. BMC Mktg.*, 65 Fair Empl. Prac. Cas. (BNA) 512, 513-16 (D.C. Cir. 1994) (individual "testers" lack standing to pursue Title VII and § 1981 damages claims because they lack a cognizable injury; injunctive relief also unavailable because defendant had "no duty to continue to consider" the testers once their fictitious credential were made known).

The essential point in all of these cases is not that an after-acquired evidence defense must be justified by one or another of these doctrines, but that after-acquired evidence of employee misconduct in appropriate circumstances may generate a valid defense under one or more of these existing doctrines. No arguments made by Petitioner or her amici should be allowed to obscure this fundamental principle.

II. AFTER-ACQUIRED EVIDENCE OF SERIOUS MISCONDUCT LIMITS RECOVERY TO DECLARATORY RELIEF AND ATTORNEYS' FEES.

In cases where the after-acquired evidence may not bar liability *in toto*—for example, where the evidence does not preclude the plaintiff from proving an essential element of her claim, or warrant entry of summary judgment for the employer on the basis of a recognized defense—the evidence nonetheless may be sufficient to affect the plaintiff's remedy. In such cases, assuming the plaintiff proves her case on the merits and the employer establishes fraud or misconduct through after-acquired evidence, her recovery should be limited to declaratory relief and attorneys' fees.

Limiting recovery to declaratory relief and attorneys' fees would be consistent with Section 107 of the Civil Rights Act of 1991,[21] which addresses a closely analogous situation, an employment action taken on the basis of both a lawful and an unlawful motive. In such cases, Congress decreed that if the plaintiff proves that reliance upon an unlawful motive was a motivating factor of her treatment, and the employer proves that she would have been treated in the same fashion regardless of the unlawful motive, the plaintiff's recovery is limited to declaratory relief plus attorneys' fees. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Supp. IV 1992). Notably, Congress rejected H.R. 1, the House version of the 1991 Civil Rights Act which (in Section 103) had called for compensatory and punitive damages in mixed-motive cases,[22] in favor of S. 1745, the Senate version of the bill, which (in Section 107) called for much more limited relief in these cases.[23]

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[21] Section 107 was a congressional response to this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which dealt with proof issues in mixed-motive cases, not remedies issues in such cases.

[22] *See generally* H.R. Rep. No. 102-40, 102d Cong., 2d Sess., pt. I (Report of the House Education and Labor Committee on H.R. 1), at 45-48, 157-58, *reprinted in* 1991 U.S.C.C.A.N. at 583-86, 686-87; pt. II (Report of the House Judiciary Committee on H.R. 1), at 16-19, *reprinted in* 1991 U.S.C.C.A.N. at 709-12. Nine members of the House Judiciary Committee included their dissenting views in the Committee Report, advocating an alternative proposal which would have limited relief in mixed-motive cases to "cease and desist" orders, attorneys' fees, and costs. *Id.* at 65-66, *reprinted in* 1991 U.S.C.C.A.N. at 751-52.

[23] No Senate Report was issued in connection with S. 1745. For Senate floor debate regarding Section 107 of this legislation, see 137 Cong. Rec. S15,464 (daily ed. Oct. 30, 1991) (statement of Sen. Dodd); *id.* at S15,476 (statement of Sen. Dole, presenting the Bush Administration's views on Section 107). When the House considered S. 1745 after it had been approved by the Senate, the limited relief in mixed-motive cases was specifically hailed as an

Contrary to the arguments of Petitioner and her amici, the plaintiff in an after-acquired evidence case is not entitled to greater relief than a plaintiff in a mixed-motive case. In both cases, discriminatory motive is presumed. The sole difference between the two plaintiffs is that, in the after-acquired evidence case, the plaintiff was successful in concealing her misdeeds, while in the mixed-motive case the employee's misconduct was discovered. Allowing the plaintiff in an after-acquired evidence case a greater recovery, as Petitioner and her amici propose, rewards fraud and concealment. Nowhere in the text or legislative history of the ADEA, Title VII, or indeed, any federal civil rights law is there any indication that Congress sought to reward employees who successfully hide their misconduct, as compared with employees whose misconduct is discovered while employed.

Limiting recovery in this fashion also comports with the fundamental principle that an employee who gains or retains her job through deceit has no legal claim to continue employment and thus is not in fact injured by the employer's conduct. These considerations motivated Congress in Section 107. *See also Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind").[24] Although Congress in Section 107 modified the Court's holding in *Price Waterhouse* that a mixed-motive defense may negate *liability* to a rule that such a defense may severely restrict

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appropriate component of the compromise bill. *See, e.g.*, 137 Cong. Rec. H9543 (daily ed. Nov. 7, 1991) (comments of Rep. Hyde); *id.* at H9547 (legislative history prepared by Rep. Hyde); *id.* at 9550 (comments of Rep. Hyde). *See also id.* at H9529 (interpretive memorandum prepared by Rep. Edwards); *id.* at H9539 (comments of Rep. Clay); *id.* at H9553 (comments of Rep. LaFalce).

[24] *Cf. Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992) (in § 1983 action, where plaintiff fails to prove an essential element of his claim for relief—here, an "actual compensable injury"—"the only reasonable [attorneys'] fee is usually no fee at all") (citation omitted).

relief, Congress approved of the logic that plaintiffs should not be compensated in such "no harm, no foul" situations. Both *Price Waterhouse* and Section 107 thus struck an appropriate balance between civil rights laws and employer rights. *See id.* at 242 (plurality opinion) noting that the "other important aspect" of Title VII is its "preservation of an employer's remaining freedom of choice"); 29 U.S.C. § 623(f)(3) (no ADEA violation if decision is based on "good cause").

Borrowing this principle from the Civil Rights Act of 1991—which admittedly does not apply to this case—avoids the convoluted and unrealistic relief inquiry suggested by Petitioner and her amici. With all due respect for the expertise of the EEOC,[25] an inquiry into when an employer would have discovered the plaintiff's misconduct is precisely the type of hypothetical collateral dispute that wastes judicial resources while accomplishing nothing.[26] Indeed, Petitioner and her amici implicitly concede

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[25] Notably, before the enactment of the 1991 Civil Rights Act—*i.e.*, under the law in effect at the time this controversy arose—the EEOC had endorsed the *Summers* approach and issued a policy guidance stating that if an employer proves a dischargeable offense through after-acquired evidence, the "employer would not be required to reinstate the charging party or to provide back pay." Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, 3 EEOC Compliance Manual (BNA) N:2119, N:2133 n.17 (March 7, 1991) (citing *Summers*).

[26] *See generally* Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 Colum. L. Rev. 1525, 1547-48 (1994) [hereinafter "Mills"] (criticizing the *Wallace* court's approach—extending the back pay period until judgment, unless the employer can prove it would have discovered the information in the absence of litigation—as potentially providing a windfall to the employee while at the same time failing to achieve its stated "make-whole" objective); *Williams & Davis, supra*, note 6, at 375 ("it is equally speculative to assume that the skeleton would have remained in the closet"). For this reason, a proposal to limit affirmative relief to the time before the employee wrongdoing actually was discovered (*see* EEOC Compliance Manual (CCH) ¶ 2095 at 2099-40 (July 14, 1992)) should also be rejected. Although such a proposal has the benefit of certainty (that is, the employee

as much, by acknowledging that in many cases an employer will be unable to prove that the wrongdoing would have been discovered at any specific time. There could be no clearer example of rewarding the unscrupulous employee than reserving *complete* relief for those whose deceit is so manifest that not only did the employer fail to discover it while the plaintiff was employed, but is forced to concede that the plaintiff covered her tracks so skillfully that her wrongdoing never would have been discovered!

Limiting relief in this fashion further avoids the even more fanciful inquiries proposed by the EEOC under the 1991 Civil Rights Act (and Title I of the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified as amended at 42 U.S.C. §§ 12101 to 12117 (Supp. IV 1992) ("ADA")). EEOC takes the position that a plaintiff cannot recover "the portion of compensatory damages . . . that would cover losses arising after" the date on which the misconduct is discovered. Policy Guidance on Recent Developments in Disparate Treatment Theory, EEOC Compliance Manual (CCH) ¶ 2095 at 2099-40 to 2099-41 (July 14, 1992). Are Title VII (and ADA) cases going to become contests in which psychiatrists will attempt to parse a plaintiff's mental anguish by time; for example, that 70% of plaintiff's mental anguish was suffered prior to her deposition? Can a plaintiff recover for the mental anguish suffered during her deposition, when she finally reveals her misdeeds? Or are we to presume that the plaintiff's now-clear conscience is of sufficient benefit to overbear her embarrassment at finally being caught?

Down this road lies madness. There is no indication that a Congress which limited similarly situated plaintiffs to declaratory relief plus attorneys' fees ever contemplated inquiries of this sort in after-acquired evidence cases (or indeed in any cases). Where an employer can prove that a plaintiff would have been discharged for previously undiscovered offenses, the plaintiff's recovery as a matter of law should be limited to declaratory relief plus attorneys' fees.

wrongdoing by definition would have been discovered on a date certain in order to be asserted in the litigation), such a rule still would benefit those who conceal their misdeeds until they are discovered in litigation. It also would create incentives to delay, obfuscate, and avoid the discovery process.

III. EMPLOYERS RELYING UPON PREVIOUSLY CONCEALED EMPLOYEE MISCONDUCT MUST ESTABLISH THAT SUCH MISCONDUCT WOULD HAVE WARRANTED TERMINATION.

Although the circumstances under which after-acquired evidence will provide a defense to an allegedly discriminatory discharge will vary based upon the nature of the evidence and the defense asserted, at a minimum an employer seeking to rely upon a prior concealed offense must prove that it would have terminated the employee on the basis of the previously concealed information. *E.g.*, *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539, 542 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994); *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992).

This requirement—which may be considered one of materiality—ensures that the after-acquired evidence would establish a legitimate, nondiscriminatory, and nonpretextual reason for the employment decision under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). As Judge Godbold explained in his dissenting opinion in *Wallace v. Dunn Construction Co.*, "[t]he reported cases . . . do not concern trivial falsities or conspiratorial concealment." 968 F.2d 1174, 1189 (11th Cir. 1992). Indeed, courts critical of the "after-acquired evidence defense" have not identified an instance in the history of the doctrine when the after-acquired evidence did not provide a legitimate reason for the employment decision. To the contrary, after-acquired evidence has, for instance, barred the claims of a plaintiff who: misstated his citizenship status and was not legally author-

ized to work;[27] copied 3000 pages of confidential personnel records to which he had access as human resources director and gave them to his attorney;[28] failed to disclose a substance abuse problem in violation of DEA regulations governing his employer, a pharmaceutical company, for whom he manufactured controlled substances;[29] omitted information regarding discharge from a prior employer due to insubordination on an application for a police officer job;[30] lied about prior residences, prior employment, prior drug use, and prior mental health problems in applying for a security position;[31] snuck into his supervisor's office, copied confidential management files, and showed them to a co-worker;[32] and falsified more than 150 insurance records.[33] Under many employers' policies, the lie itself, rather than the underlying information it clothed, may be grounds for terminating the employment contract.[34]

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[27] *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247 (D. Utah 1993).

[28] *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992).

[29] *Bray v. Forest Pharmaceuticals, Inc.*, 812 F. Supp. 115 (S.D. Ohio 1993).

[30] *Carroll v. City of Chicago*, No. 87C 8995, 1990 WL 37631 (N.D. Ill. 1990).

[31] *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991).

[32] *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992).

[33] *Summers*, 864 F.2d at 700.

[34] *See, e.g., Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246 (N.D. Ohio 1993) (undisclosed prior injury not sufficient to bar claim where plaintiff was not discharged after a similar injury occurred, but the falsification itself was grounds for discharge where there was no proof that any other employee's lie had gone unpunished); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992) (granting summary judgment on Title VII and ADEA claims where employee lied on his application regarding a prior felony conviction and, under the employer's policy, honesty per se was a requirement of employment); *Bonger*, 789 F. Supp. at 1102 (human resources director's dishonesty regarding college degree was in itself grounds for discharge).

Moreover, to the extent that an employer relies upon such evidence at the summary judgment stage, it must establish its right to judgment under normally applicable principles. Although Petitioner and her amici repeatedly criticize the "self-serving" affidavits relied upon below, the lower courts regularly and routinely reject summary judgment motions based upon after-acquired evidence where such evidence does not warrant judgment for the employer. In *Malone v. Signal Processing Technologies, Inc.*, 826 F. Supp. 370, 375-76 (D. Colo. 1993), for instance, a district court bound by the Tenth Circuit's decision in *Summers* nonetheless refused to grant summary judgment where the employee did not admit to the alleged misconduct and she presented some evidence that the employer knew of the misconduct and would have rethired her anyway. Earlier, the same court denied an employer's motion for summary judgment based on after-acquired evidence of resume fraud where the plaintiff presented a factual issue as to whether the employer had asked for the plaintiff's prior tardiness record and as to whether a pardoned felony conviction would have been grounds for refusal to hire. *Punahele v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991). Likewise, in *Tuohey v. Clark Oil & Refining Corp.*, No. 92 C 8358, 1994 WL 280084 (W.D. Ill. 1994), the court refused to grant summary judgment where the employer's affidavit attesting to the fact that it would have fired the employee for omitting a prior felony conviction was rebutted by affidavits showing that the employer knew of the conviction and did not fire the plaintiff.

In each of these illustrative cases, and many others,[35] the plaintiff presented a triable issue regarding the after-

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[35] *E.g., Welch v. Liberty Mach. Works*, 23 F.3d 1403, 1405-06 (8th Cir. 1994) (recognizing after-acquired evidence of employee misrepresentations as barring wrongful discharge claim, but denying summary judgment where a single employer affidavit did not carry the employee's burden of establishing an existing discharge

acquired evidence. Where this is so, under normal summary judgment rules, the case in question should go to trial.

Here, in contrast, Petitioner admitted that she copied and removed from the office sensitive personnel documents to which she had access only by virtue of her position as a confidential secretary to the Banner's comptroller. (J.A. at 117a-118a, 132a-133a, 150a.) She further admitted that maintaining the confidentiality of company records was an essential aspect of her job duties which, if abrogated, would lead to her discharge. (J.A. 154a.) Under the after-acquired evidence doctrine, therefore, the courts below correctly determined that a trial would serve no purpose and therefore granted summary judgment in favor of the Banner.

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policy that is "more than mere contract or employment application boilerplate"); *Conlin v. Mission Foods Corp.*, 850 F. Supp. 856 (N.D. Cal. 1994) (rejecting the employer's after-acquired evidence defense where the employer failed to carry his burden of proving that the employee had fraudulently misrepresented his prior work experience); *DeVoe v. Medi-Dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992) (refusing summary judgment on grounds of after-acquired evidence that employee had failed to disclose credit and child custody problems that impeded relocation where employee showed she was not in fact terminated after her employer became aware of her legal problems); *Rupley v. Rorer Pharmaceutical Corp.*, No. 90 C 5597, 1992 WL 37121 (N.D. Ill. 1992) (after-acquired evidence that employee claiming age discrimination had second job that sometimes interfered with his primary employment not sufficient grounds for summary judgment where court found genuine issue of material fact as to whether it was company policy to terminate employees based on outside employment and as to extent to which outside employment would be tolerated).

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully urges this Court to affirm the Sixth Circuit's decision.

Respectfully submitted,

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September 8, 1994